

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1774 of 2004
With

CRIMINAL APPEAL No. 1307 of 2006
With

CRIMINAL APPEAL No. 2318 of 2006
With

CRIMINAL APPEAL No. 620 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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NITIN KHIMJI BHANUSHALI @ RAMBHAI @ R K
GAJERA - Appellant

Versus

STATE OF GUJARAT & 1 - Opponents

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Appearance :

1. Criminal Appeal No. 1774 of 2006

MR PM VYAS for Appellant.

MR KT DAVE, APP for Respondent No. 1

MR RJ OZA, Special PP for Respondent No. 2.

2. Criminal Appeal No. 1307 of 2006

MR MO BAROD for Appellant.

MR KT DAVE, APP for Respondent No. 1.

MR RJ OZA, Special PP for Respondent No. 2.

3. Criminal Appeal No. 2318 of 2006

MR PM SHUKLA for Appellant.

MR RJ OZA, Special PP for Respondent No. 1.

MR KT DAVE, APP for Respondent No. 2.

4. Criminal Appeal No. 620 of 2006

MR RJ OZA, Special PP for Appellant.

None for Respondent No. 1.

MR KT DAVE, APP for Respondent No. 2.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 30/03/2007
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Since all these four criminal appeals are arising out of the same judgment and order passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 57 of 1999 and since all these four appeals are heard together, the same are being disposed of by this common judgment and order.

2. Criminal Appeal No. 1774 of 2004 is filed by the appellant - original accused No. 1 i.e. NITIN KHIMJI BHANUSHALI @ RAMBHAI @ R K GAJERA. Criminal Appeal No. 1307 of 2006 is filed by the appellant - original accused No. 3 i.e. DAYARAM MANGALDAS NAKHAVA @ BHIKHUBHAI. Criminal Appeal No. 2318 of 2006 is filed by the appellant - original accused No. 2 i.e. NALINKUMAR PRABHUDAS RAICHURA. All these three appellants were convicted for an offence punishable under Section 22 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) by the

learned Additional Sessions Judge, Rajkot in Sessions Case No. 57 of 1999 vide his judgment and order dated 27.08.2004 and they were sentenced for R.I. of 10 years with fine of Rs.1 Lac and in default thereof, to undergo R.I. for one year.

3. Criminal Appeal No. 620 of 2006 is filed by Shri M.M. Gunsai, Senior Intelligence Officer, Directorate of Revenue Intelligence (for short 'DRI') against the judgment and order dated 27.08.2004 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 57 of 1999 acquitting the respondent – original accused No. 4 i.e. M/s. Omni Engineering Industries Private Limited from the charge of offences levelled against it under the provisions of Section 22, 29 & 38 of the NDPS Act.

4. The brief facts revealed in the complaint as well as unfolded during the course of trial are as under :-

5. The Officers of DRI, Ahmedabad, Jamnagar and Gandhidham were working on an information which revealed that the person named R. K. Gajara @ Rambhai staying in Room No. 205 of Hotel Savera Palace, Limda Chowk, Rajkot was engaged in manufacture and sale of Mandrex tablets / Methaqualone powder - a prohibited substance under the NDPS Act at one factory somewhere in the outskirts of Rajkot and some tablets/powder are secreted in the said hotel room. Pursuant to the said information, the DRI Officers along with independent Panchas reached the said Hotel and after showing the Search Authorization issued under the NDPS Act to the hotel representative went over to the Room No. 205 on 15.12.1998 at 10.45 a.m. Along with the said Panchas and the Hotel Manager. One person who introduced himself as R. K. Gajara @ Rambhai opened the door when the Officers knocked on the door in the presence of the said Panchas and Hotel Manager. Thereafter, during the search of the said hotel Room, conducted in the presence of the Panchas, the Hotel Manager and the said person R.

K. Gajara, the officers found that the left side drawer of the bedside table contained the following things :-

- i. A white medium size carry bag in which 50 Nos. of light brown colored tablets of different sizes were found. The said tablets had the letter 'M' or M imprinted on one side and "+" imprinted on the other side.
 - ii. 3 Nos. of light brown colored tablets kept folded in a piece of newspaper. On the one side of the said tablets were the words 'LA CURE' and on the other side 'PARA' imprinted.
 - iii. Another piece of newspaper containing a small plastic bag and a little brown colored powder.
 - iv. A piece of paper in which a few small lumps and pieces of white, light brown or greenish substance.
6. The person who introduced himself as R. K. Gajara on being asked, informed the Officers that the brown colored tablets were Mandrex tablets and the brown powder, Mandrex Powder. As the field testing kit was not available, these tablets could not be

subjected to test for the results immediately at the same place. The said tablets and powder were therefore placed in separate envelopes with labels and were sealed with sealing wax and seal. The labels bore the signatures of the Panchas, the Hotel Manager, the officer and R. K. Gajara. Subsequently, certain rubber stamps of the Companies viz.; Omega Trading Co., Ramson Overseas, found in the drawer of the dressing table in the said hotel Room, were also taken over in sealed envelope after taking their impression on paper. Then, Rs. 12,000/- in cash were found in a plastic bag during the search. The same on being asked by the Officers was informed by the said R. K. Gajara to be connected to the sale proceeds of the Mandrax tablets. Certain documents were also recovered during the search of Room No. 205 of Hotel Savera Palace. The said tablets, cash amount and documents were taken over by the Officers under the provisions of the NDPS Act.

7. Thereafter, the personal search of the person, who introduced himself as R. K. Gajera was conducted in the presence of Shri Yogendra Garg, Assistant Director, DRI, Ahmedabad, Gazetted Officer. Before the personal search, the Officers gave an option to the said Shri R. K. Gajra to be searched before a Gazetted Officer or before a Magistrate in terms of Section 50 of the NDPS Act and Shri Gajra opted for search before a Gazetted Officer. During the personal search of the said R. K. Gajera, seven light brown colored tablets with markings 'M' on one side and '+' on the other side in a small paper packet were found in left side pocket of his pants. He informed the Officers on inquiry that the said tablets were sample of Mandrax Tablets. The said tablets were then placed in marked and labelled envelope and sealed with sealing wax and seal and were taken over in the presence of the Panchas. Further, from the right side pants pocket Rs.15,000/- in cash were recovered. The same was informed to be connected to the Mandrax tablets by Shri R. K. Gajera on inquiry and hence, the same was also taken over in a

duly marked and labelled and sealed envelope. On persistent inquiries by the officers, the said Mr. R. K. Gajera informed the Officers that his real name was Nitin Khimji Bhanushali and that he was a resident of Mumbai. Then on being asked by the Officers, the said Shri Nitin Khimji Bhanushali voluntarily agreed to accompany the Officers and show the factory where the Mandrax tablets were being manufactured.

8. The Officers along with one of the said two Panchas and Shri Nitin Khimji Bhanushali, the accused No. 1 left the Hotel. As the other Panch expressed his inability to continue as Panch witness due to his ill health, the Officers before leaving the Hotel, informed their standby team of DRI Officers to reach the place specified by accused No. 1 along with one Panch witness and wait nearby the said place, viz. outside the gate of M/s. Omni Engineering Industries Private Limited, 1116, GIDC, Metoda, Tal. Lodhika, Dist. Rajkot. On reaching the said location, the

Officers of both the teams along with two Panchas and accused No. 1 entered the factory premises above and the accused No. 1 led the Officers to the back side of the said factory where Shri Nalinkumar Raichura, the accused No. 2 and Shri Dayaram Mangaldas Nakhwa, the accused No. 3 were found. Their personal search was conducted in the presence of the complainant, namely, M. M. Gunsai who is the Gazetted Officer, as per their option. Three keys in a key chain were recovered from the right side pant pocket of accused No. 2. The same on being asked were informed to be the keys for the locks put on the three rooms having chemical and machinery at the rear side of the factory. The Officers then took over the said keys and opened the said three rooms one by one in the presence of the Panchas and the accused Nos. 1,2 & 3. It was found that room No. 1 contained a tabletting machine, barrels and drums and carboys and some Brown colored powder. The accused Nos. 1 & 2 informed the Officers that the brown colored powder was Methaqualone powder and the chemicals were used for manufacture of the

same. They also told that the Electric Dryer and the tableting machine were used and were being used for making the Methaqualone powder / tablets. Room 'B' contained certain equipment which were told to be used for making the Methaqualone powder by the accused Nos. 1 & 2 and Room No. C also contained certain chemicals which were also admitted to be used for methaqualone powder by the accused Nos. 1 & 2. The brown colored powder substance found in the room No. 'A' was tested with the Field Testing Kit in the presence of the Panchas and the test resulted positive for Methaqualone. Therefore, samples were drawn from the said brown colored powder substance purported to be methaqualone and the different chemicals found in the said three rooms and were labelled and sealed and were seized under the provisions of the NDPS Act. The said chemicals found in Room 'A' 'B' and 'C' and seized were Acetic Anhydride weighing 482 Kgs., Ortho Toluidine weighing 199 Kgs., PCL-3 weighing 186 Kgs, Anthranilic Acid 98% weighing 414.4 Kgs., Caustic Soda weighing 740.1 Kgs. and

Methanol 2.51 Ltrs. and as informed by the accused No. 1 and 2 that with the said quantities of the aforementioned chemicals, approximately 400 Kgs. of methaqualone can be manufactured. The Mixer unit fitted with electric motor, the glass distilling unit fitted with electric motor, electric starter and electric main switch found in Room No. 'B' and the tableting machine, Electric Dryer along with 12 trays, vessels for filtration, electric motor starter and electric pump found in Room 'A' were also seized under the provisions of the NDPS Act under cover of Panchnama dated 15/16.12.1998. During the search, the Officers and the Panchas also found that the electric supply to the machinery in the said three rooms had been provided from inside the shop floor of the factory. The quantity of methaqualone seized was 11.5 Kgs. and the estimated market value of the same was Rs. 2.30 Lacs. The value of the other chemicals seized was Rs.3.99 Lacs and the value of machinery and other articles seized was Rs.37.39 Lacs. The total value of the seizure made at M/s. Omni Engineering, the accused No. 4 was Rs.43.68

Lacs. After the search of the above mentioned three rooms was over, the Officers asked the accused Nos. 1 & 2 in the presence of the Panchas whether the tablets purported to be Mandrax (Methaqualone) tablets recovered from Room No. 205 of Hotel Savera Palace on 15.12.1998 were manufactured in the said place and they answered that the same were manufactured there. Then on being asked by the Officers about the die/die punches used for manufacturing the said tablets, the accused Nos. 1 & 2 told that the same were kept hidden beneath one of the cupboards in the office room of M/s. Omni. Then the accused No. 2 in the presence of the Panchas, Officers and others took out a box containing some die-punches and die bases from beneath one of the cupboards. The markings on the same were examined in the presence of Panchas and the accused and the markings on these die and punches were the same as those found on the tablets recovered from the Room No. 205 occupied by the accused No. 1 during the material time and from the personal possession of the accused No.1. Accused

Nos. 1 & 2 on being asked informed that these die punches had been used for manufacturing of the Mandrax tablets. Also one of the panchas, who was present as Panch during the search of hotel room on 15.12.1998 identified the markings to be matching with the markings on the tablets recovered from the Room No. 205 of Hotel Savera Palace and the pocket of the accused No. 1. Therefore, the said die punches and die base were then sealed and seized under the provisions of the NDPS Act under Panchnama dated 15/16.12.1998.

9. When the Officers asked the accused Nos. 1 & 2 whether any other part of the factory premises of the Company was used for manufacturing Methaqualone powder / tablet and they replied in the presence of the Panchas that one room on the first floor of the office was used for manufacturing one batch of Mandrax Powder. The machinery to manufacture sheet metal parts, raw materials and semi-finished processed materials for the manufacture of the same

were seized under the provisions of the NDPS Act under Panchnama dated 15/16.12.1998.

10. Since during the search of Hotel Room on 15.12.1998, the material recovered could not be tested due to non-availability of the field testing kit, after the search panchnama of the factory was concluded at 14.30 hours on 16.12.1998, the tablets, powder and lumps and pieces of material informed by the accused No. 1 to be Mandrax tablets / powder when recovered from Room No. 205 of Hotel Savera Palace and from the pants pocket of the accused No. 1 and which were kept in the sealed and labelled envelopes, were opened in the presence of Panchas and Shri Nitin Bhanushali and tested with the field testing kit. On testing the tablets, powder and lumps and pieces, the test was found positive for Methaqualone. Hence, samples were drawn from the tablets / lumps and pieces and duly sealed. The remaining quantities were also separately sealed and all the said tablets/powder/lumps and pieces along

with the samples were seized under the provisions of NDPS Act.

11. After seizure of the contraband psychotropic substance, the DRI Officers recorded the statements of the accused and other persons under Section 67 of the NDPS Act and collected further evidence. The samples drawn under Panchnama dated 15.12.1998 for the brown coloured powder purported to be Methaqualone seized from the room A at the rear side of the factory and samples of the chemicals seized from room A and C at the rear side of the factory were sent to Forensic Science Laboratory at Junagadh. The samples of the brown coloured tablets / lumps and pieces and the powder taken over under Panchnama dated 15.12.1998 from Room No. 205 of Hotel Savera Palace and seized under Panchnama dated 16.12.1998 drawn at the factory were sent to FSL at Ahmedabad. The test reports received from the FSL at Junagadh and Ahmedabad confirmed that the samples of brown coloured

powder and the samples of Brown coloured tablets / lumps and pieces / powder mentioned above answered positive for Methaqualone a Psychotropic Substance under the NDPS Act. The samples of the chemicals sent for analysis were identified as Ortho Toludine, Acetic Anhydride, Sodium Hydroxide and Anthranilic Acid. The test report also mentions that Ortho Toludine, Acetic Anhydride and Anthranilic Acid can be used in preparation of Methaqualone. As far as PCL-3, another chemical seized, is concerned it is submitted that it is a Hazardous Chemical. Hence, the sample was not drawn from the said chemical for testing and the name of the chemical was written on side of the barrel containing the said chemical and this fact was also noticed by the Panchas at the time of seizure and accordingly, recorded the Panchnama dated 15/16.12.1998. The complaint was, therefore, filed against all the three accused and the Company for the offences punishable under Section 8 (c) read with Section 22, 28 & 29 of the NDPS Act before the learned Additional Sessions Judge, Rajkot which is registered

as Sessions Case No. 57 of 1999.

12. After filing of the complaint, the learned Additional Sessions Judge, Rajkot framed charge against the accused persons for commission of the offences punishable under Sections 8 (c) read with Sections 22, 29 and 38 of the NDPS Act. The charge was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Sessions Case No. 57 of 1999.

13. To prove the culpability of the accused, the prosecution has examined and relied upon the evidence of nine (9) witnesses, the details of which are given in paragraph 9 of the impugned judgment and order and the same are as under :-

Sr. No.	Exh. No.	Particulars
1	51	P.W No. 1 - Mr. Mayagar Mangar Gunsai, A Sr. Intelligence Officer.
2	135	P.W No. 2 - Mr. Anilkumar Ramprasad Vadhva, A Sr. Intelligence Officer.

Sr. No.	Exh. No.	Particulars
3	144	P.W No. 3 – Mr. Balkrushna Radhamohan Tivari, An Intelligence Officer.
4	153	P.W No. 4 – Mr. Rameshkumar Jagjivan Thakkar, an Intelligence Officer.
5	161	P.W No. 5 – Mr. Thandilal Ratanlal Mina, An Intelligence Officer.
6	171	P.W No. 6 – Mr. Hitendra Gopaldas Surani, A Panch Witness.
7	175	P.W No. 7 – Mr. Velapulla Purnachandra Rao, Assistant Director, D.R.I.
8	185	P.W No. 8 – Mr. Paren Natvarlal Desai, An Intelligence Officer.
9	198	P.W No. 9 – Mr. Yogendra Ramkumar Garg, Assistant Director, D.R.I.

14.To prove the case against the accused, the prosecution has also produced and relied upon number of documents and contents thereof. The documents are in the form of complaint, panchnama, FSL Report, various reports made to higher-up by the Investigating Officer, Yadi sent to various other authorities, relevance of which for deciding these appeals would be discussed hereinafter in this judgment at the appropriate time.

15.After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions

Judge, Rajkot explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement, the accused persons denied the case of the prosecution in toto. They neither led any evidence nor examined any witnesses to support their defence.

16. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Rajkot has convicted the appellants - original accused Nos. 1, 2 & 3 from the charge of offences punishable under Section 22 read with Section 29 of the NDPS Act and were sentenced for R.I. for 10 years with fine of Rs. 1 Lacs each and in default thereof, to undergo R.I. of one year. The learned Additional Sessions Judge, Rajkot has, however, acquitted the original accused No. 4, the Company, from the charge of offence punishable under Section 8 (c) read with Section 22,

29 & 38 of the NDPS Act. It is this order which has given rise to this four appeals, first three appeals are filed by the accused Nos. 1 to 3 and fourth appeal is filed by the DRI Officers.

17.Mr. P. M. Vyas, learned advocate appearing for the appellant - original accused No. 1 in Criminal Appeal No. 1774 of 2004 has submitted that the learned Additional Sessions Judge, Rajkot has falsely implicated the accused No.1 in this case and there is no substantive or material evidence appearing against him. The learned Additional Sessions Judge, Rajkot has erred in holding the accused No. 1 guilty in view of the discrepancies between the witnesses' evidence and the circumstances accompanying such evidence. He has further submitted that there is complete breach of Section 42 of the NDPS Act inasmuch as the Officer who received the information was Mr. Wadhera and Mr. Wadhera has merely informed and consulted Mr. Garg who is his immediate superior Officer. This makes it clear that

there is breach of Section 42 (2) of the NDPS Act. Section 42 (2) requires that where an Officer takes down any information in writing under Sub-section (1) or records grounds for his believing under proviso thereto, he shall forthwith send a copy thereof to his immediate superior Officer. Therefore, under Section 42 (2), for the information reduced into writing, a copy of the same is to be forwarded to the immediate superior Officer which has not been done in the present case by the concerned Officer. Therefore, even as per the impugned judgment of the learned Additional Sessions Judge, Rajkot, a copy of the information reduced to writing was not forwarded to the superior Officer. Mr. Vyas has further submitted that there is also clear breach of Section 50 of the NDPS Act inasmuch as before taking personal search, necessary options were not given to the accused No. 1. The learned Additional Sessions Judge, Rajkot has solely relied upon the statements of the accused recorded under Section 67 of the NDPS Act for convicting them for the alleged offences punishable under the provisions of

the NDPS Act. The prosecution is required to prove that the statements recorded under Section 67 of the NDPS Act were made voluntarily and when the prosecution failed to prove that such statements were made voluntarily, relying upon such statements brought on record, the accused could not have been convicted and there was no sufficient and satisfactory evidence on record to hold him guilty for the charges levelled against him. After insertion of Section 53-A on the statute board, the DRI Officers of Custom department or Revenue Officers are considered the Police Officers and Police Officers record the statement of the accused, this statement would be hit by Sections 24 to 27 of Indian Evidence Act. He has further submitted that there is no compliance of the provisions contained in Section 50 of the Act inasmuch as that even if the members of raiding party were the Gazetted Officers, in view of safeguards provided under Section 50 of NDPS Act, personal search of the accused should have been made in presence of an independent Gazetted Officer, who had no concern with the prosecution

and outcome of the case and admittedly, the Gazetted Officers in whose presence, personal search of the accused No. 1 was made were the members of the raiding party and, therefore, it cannot be said that the prosecution has complied with Section 50 of the Act and on point of violation of relevant provisions of Section 50 of NDPS Act, the accused No. 1 should be acquitted. Mr. Vyas has further submitted that the accused No. 1 was wrongly convicted and held guilty for the offence punishable under Section 8 (c) read with Sections 22 & 29 of the Act and hence, he deserves to be acquitted forthwith and appeal of the accused No. 1 be allowed accordingly.

18.Mr. M. O. Barod, learned advocate appearing for the appellant – original accused No. 3 in Criminal Appeal No. 1307 of 2006 has submitted that the prosecution has miserably failed to prove any case against the accused No. 3. The learned Additional Sessions Judge, Rajkot has ever looked the omissions,

contradictions and improvements in the evidence on record and has reached the conclusion which no reasonable man could have ever reached. The accused No. 3 was not found with any contraband substance and he was also not found preparing or manufacturing any contraband substance or alleged Mandrex tablets at the time of searching the premises of the Company. There was no evidence on record for presuming that the tablets recovered during search at Hotel Savera Palace have been prepared or made by the accused No. 3. Except the statements of the co-accused recorded under Section 67 of the NDPS Act, there is no material or evidence against the accused No. 3. The statements of accused No. 3 recorded under Section 67 of the NDPS Act were under influence, duress and persuasion. The accused No. 3 was threatened by the DRI Officers that if he would not give any statement under Section 67 of the Act, he would be booked for the offence punishable under the NDPS Act and under this influence, the accused was compelled to give the statement under Section 67

and, therefore, the said statement under Section 67 cannot be said to be voluntary and true. The said statement was recorded under the influence and coerce. So far as alleged Methaqualone powder is concerned, the accused No. 3 is not the manufacturer and he has not taken any participation in manufacturing the said powder. He has, therefore, submitted that the accused No. 3 was absolutely innocent person and has not committed any offence, much less, the offence punishable under Sections 22, 29 & 38 of the NDPS Act and he is required to be acquitted from the charge of offences levelled against him.

19.Mr. P. K. Shukla, learned advocate appearing for the appellant – original accused No. 2 in Criminal Appeal No. 2318 of 2006 has virtually adopted the arguments advanced by Mr. P.M. Vyas and Mr. M. O. Barod and submitted that accused No. 2 was wrongly implicated. The accused No. 2 was never the Director of the Company and still he has been

projected and treated as the Director of the Company. The real culprits who are associated with the Company have gone scot-free and the prosecution has miserably failed in booking them for the alleged crime. The learned Additional Sessions Judge, Rajkot has also not decided an application made by accused No. 2 under Section 59 of the Act and though the said application was kept for hearing and that the reply to the said application was filed on behalf of the complainant, the same was not decided and straightway, issues were framed. He has filed written submissions dated 12.03.2007 reiterating the contentions orally raised by him. He has further submitted that there is basic fallacy in the case of the prosecution and hence, the conviction order passed against the accused No. 2 deserves to be quashed and set aside and the accused No. 2 deserves to be acquitted.

20.Mr. R. J. Oza, learned advocate appearing for the original complainant - DRI has submitted that the

learned Additional Sessions Judge, Rajkot has recorded the finding that the prosecution has failed to prove that accused Nalinkumar Raichura is the Director of the Company, namely, M/s. Omni Engineering Industries Private Limited. There is no evidence except statement of Nalin Raichura under Section 67 of the NDPS Act produced at Exh. 77 that he is Director of M/s. Omni Engineering Industries Private Limited. The learned Additional Sessions Judge, Rajkot has wrongly observed that the said accused Shri Nalin Raichura has disputed the fact that he is the Director of the Company right from the beginning and based on this, the learned Additional Sessions Judge, Rajkot has passed the order acquitting the respondent Company from the charge of offences punishable under Sections 22, 29 & 38 of the NDPS Act. He has further submitted that the learned Additional Sessions Judge, Rajkot has, while making observations in respect of the investigation and recording finding in support of the acquittal of the respondent Company, failed to consider the following relevant material and evidence on record :-

- 1) Panchnama dated 16.12.1998, during which on entering at the factory, Nalin Raichura had introduced himself as Director of the Company. The Court has admitted this Panchnama as evidence. The Panchnama witness has also given confirming testimony before the Court. (Exh. 68 at Page 241).
- 2) Summons dated 16.12.1998 issued to Nalin Raichura as Director of the Company was accepted by Nalin Raichura. (Exh. 76 - Page 295).
- 3) Statement dated 16.12.1998 of Nalin Raichura read with Personal Data and Financial Profile dated 16.12.1998 prepared by Nalin Raichura. Both the evidences were recorded before Shri Tiwari, I.O., D.R.I., Jamnagar and his testimony before the Court has confirmed the facts. The statement and financial profile have been admitted by Court as evidence. (Exh. 77 - Page 296).
- 4) Statement dated 16.12.1998 of Shri Kishore Acharya, Clerk of the Company, who confirmed the status of Nalin Raichura as Director of the Company. This statement was recorded before Shri T. L. Meena, I.O., D.R.I., Jamnagar and in his testimony

before the Court, he also confirmed the facts. (Exh. 81, Page No. 386).

5) Further statement dated 16.12.1998 of Shri Kishore Acharya, Clerk of the Company, wherein he identified Nalin Raichura as Director of the Company and Nalin Raichura also signed this identification. This statement was recorded before Shri T. L. Meena, I.O., D.R.I., Jamnagar and in his testimony before the Court, he also confirmed the facts. (Mark 63/54).

6) Statement dated 17.12.1998 of Dayaram Nakhwa, wherein he identified Nalin Raichura as Director of the Company. This statement was recorded before Shri Desai, I.O., D.R.I., Jamnagar, who also confirmed the facts during his testimony before the Court. (Exh. 79 and 85, Page Nos. 301 and 315).

7) Summons dated 16.12.1998 issued to Nalin Raichura for appearance on 17.12.1998. This summons was given in the capacity as Director of the Company, which was accepted by Nalin Raichura. (Exh. 86, Page 317).

8) Letter dated 16.09.1998 of the Company addressed to GSFC, Rajkot signed by Nalin Raichura as

Director of the Company. This document was recovered during the search conducted at the residence of Shri Bakul Parekh by SIO, DRI, Mumbai on 19.12.1998. (Mark 63/95).

9) Statement dated 21.12.1998 of Shri Bakul Parekh before Shri Dabhole, SIO, DRI, Mumbai. (Mark 63/128).

10) Statement dated 21.12.1998 of Shri Divyesh Sejpal before Shri Picardo, IO, DRI, Mumbai. (Mark 63/132).

11) Statement dated 04.01.1999 of Shri Sejpal recorded before Shri Wadhwa, SIO, DRI, Ahmedabad. In his testimony before the Court, Shri Wadhwa confirmed the recording of statement before him. (Mark 63/141).

12) Statement dated 04.01.1999 of Shri Bakul Parikh recorded before Shri Wadhwa, SIO, DRI, Ahmedabad. In his testimony before the Court, Shri Wadhwa confirmed having recorded the statement. (Mark 142).

13) Statement dated 29.01.1999 of Shri Sejpal, before

Shri Rao, A.D., D.R.I., Jamnagar, wherein he submitted the Articles of Association and Memorandum of Association of the Company signed by four shareholders of the Company as Promoters of the Company on 30.04.1995. He also submitted Minutes of Meeting dated 30.09.1995 of the Board of Directors of the Company, wherein by resolution, Nalin Raichura, Manager of the Company was appointed as Director of the Company. He also submitted copy of minutes of the Meetings dated 14.11.1995, 30.12.1995, 10.01.1996, 01.03.1996, 07.05.1996, 14.08.1996, 25.10.1996, 10.02.1997, 15.05.1997, 19.11.1997 and 27.08.1998 of the Board of Directors of the Company, which were shown as attended by Nalin Raichura as one of the Directors of the Company. Shri Rao confirmed recording of statement in his testimony before the Court. In terms of Section 254 of the Companies Act, 1956 Nalin Raichura upon signing Memorandum became deemed Director of the Company. (Mark 150/152).

14)Statement dated 16.12.1998 of Nitin Bhanushali before Shri Gunsai, SIO, DRI, Jamnagar. Shri Gunsai confirmed this statement during his testimony before the Court. (Exh. 75, Page 287).

15)Statement dated 19.02.1999 of Shri Sejpal before Shri Rao, AD, DRI, Jamnagar, during which Shri

Sejpal admitted copy of letters of the Company addressed to the Superintendent, C. Ex. A.R.-VI, Rajkot submitting therewith Declarations under Section 173-C of the Central Excise Act, 1944 under the signature of Nalin Raichura as Director of the Company. He also submitted Annual Return of the Company for the year 1997-98, which was submitted to the ROC under letter dated 28.12.1998, Mumbai and in which Nalin Raichura was shown as Director of the Company. He also submitted application dated 27.12.1996 for Registration of charge filed by the Company with ROC, Mumbai in favour of Jeevan Commercial Bank, Rajkot, which was signed by Nalin Raichura as Director of the Company and which was registered on 22.09.1997. He also submitted the Loan-papers, assignment-deed, Promissory Note etc. documents executed with Jeevan Commercial Bank, Rajkot by Nalin Raichura as Director of the Company. Shri Rao confirmed this statement during his testimony before the Court. (Mark 176).

21.Mr. Oza has further submitted that the complainant filed an application at Exh. 196 for giving exhibit to various documents including those documents, which are referred to as Mark documents. However, the learned Additional Sessions Judge, Rajkot by an

order dated 01.07.2004 passed below Exh. 196 rejected the said application and held that "it is pertinent to note here that the statements given by the accused during the inquiry before the empowered Officer mentioned under Section 42 of the NDPS Act and certainly be read, exhibited and admitted in evidence and relying upon the statement of the accused along with other evidence on record, the accused can be held liable for the alleged offences, but the statement of witness who subsequently have not been arraigned as the accused cannot be exhibited, admitted and read in the evidence. It is also necessary to note here that such kind of argument was also advanced at the relevant time when the statements of witnesses were produced in chief examination of the concerned DRI Officers and at that time, it was held that such question would be decided afterward and the question kept pending is also decided against the prosecution."

22.Mr. Oza has further submitted that the statement of accused Nalin Raichura under Section 67 of the NDPS Act was recorded on 16.12.1998. The said accused accepted summons in Criminal Case No. 57 of 1999 in the capacity of Director of the respondent No. 4 Company on 26.03.1999. Thereafter, charge against the accused framed at Exh. 95 dated 26.03.2003 and while recording plea on behalf of the respondent Company at Exh. 99, Shri Nalin Raichura has, for the first time, specifically denied that he is a Director of the respondent Company. Thus, for the first time Shri Nalin Raichura disowned his status of the Director of the respondent Company only on recording of his plea. Mr. Oza has further submitted that there is voluminous evidence on record showing that Mr. Nalin Raichura was a Director and over and above this, the factory premises was utilised for manufacturing of Mandrex tablets and hence, it cannot be said that the present respondent - accused No. 4 Company was not involved in commission of crime. He has, therefore, submitted that the appeal filed by the DRI Officer deserves to be allowed and

the judgment and order under challenge is required to be quashed and set aside.

23. So far as appeals filed by all the three accused are concerned, Mr. Oza has submitted that the learned Additional Sessions Judge, Rajkot, after proper appreciation of facts and considering the relevant statutory provisions and applying the decided cases to the facts of the present case, has come to the just and proper conclusion and rightly convicted all the three accused and hence, this Court should not disturb the finding and conclusion arrived at by him.

24. While dealing with the submissions of the appellants with regard to non compliance of the statutory provisions contained in the NDPS Act, Mr. Oza has submitted that the provisions contained in Sections- 41, 42, 50 and 52 have been duly complied with. He has further submitted that Mr. Wadhera is an officer of Directorate of Revenue Intelligence and he has received an information that one person, namely, R.

K. Gajara @ Rambhai staying in Room No. 205 of Hotel Savera Palace, Limda Chowk, Rajkot was engaged in manufacture and sale of Mandrex tablets / Methaqualone powder - a prohibited substance under the NDPS Act at one factory somewhere in the outskirts of Rajkot and some tablets/powder are secreted in the said hotel room. This information was communicated to Mr. Garg who is his immediate superior Officer. Thereafter, the Officers of DRI Ahmedabad, Jamnagar and Gandhidham have prepared the programme of raid / operation at the said Hotel. He has further submitted that Sub-section (2) of Section-42 of the Act requires that information should be reduced into writing and copy be sent to his immediate superior Officer. The said formality has been observed and hence, the requirement of law under Section-42(2) of the NDPS Act has been fully complied with. Even otherwise, the Officers who have conducted search and seizure at the Hotel as well as at the factory premises were themselves are Gazetted Officers and as per the law laid down by the Hon'ble Supreme Court in the case

of **M. Prabhulal V/s. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 S.C. 4311**, when the Gazetted Officer has himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. In the case of **G. Srinivas Gaud V/s. State of A.P., (2005) 8 SCC 183**, the Hon'ble Supreme Court has held that provisions of Sub-section (2) of Section 42 are meant to cover cases falling under section 42 (1). Therefore, the requirement under Section 42 (2) need not be extended to cases of arrest, search and seizure by officers of Gazetted rank. The Officer of Gazetted rank while authorizing junior Officers under Section 41 (2) knows what he is required to do and, therefore, there is no need for reporting. For this reason, Section 41 does not contain any such requirement. The need for reporting under Section 42 (2) arises because the Officer proceeds without authorization in terms of Section 41 (1) or 41 (2).

The requirement of informing the immediate official superior under Section 42 (2) has to be confined to cases where the action is taken by officers below the rank of Gazetted officers without authorization.

25.Mr. Oza has further submitted that requirement laid down under Section-67 of the Act has also been complied with. Requirement of Section-67 is that any officer referred to in Section-42 of the Act who is authorised in this behalf by the Central Government during the course of any inquiry in connection with the contravention of any provisions of this Act to call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provision of this Act or require any person to produce or deliver any document or thing useful or relevant to the inquiry or examine any person acquainted with the facts and the circumstance of the case. He submitted that in the present case, the concerned Officer has been authorized by the Directorate of Revenue

Intelligence to enter into search any such building, place or seize any Narcotic Control Drug, material used in the manufacture or article used in such manufacture of the Narcotic Control Drug which are used for the purpose of commission of any offence punishable under the Act and the order to that effect was issued. Acting on the specific order issued in his favour, the concerned Officer has issued summons to all the accused persons who were present at the factory premises calling upon them to give the information about the offence committed by them and subsequently a statement under Section-67 was asked to be recorded of those accused persons in their own hand writing. Thus, the requirement of Section-67 is fully satisfied. He has further submitted that the statement recorded under Section-67 of the Act is admissible in nature.

26. In support of the submissions of Mr. Oza on confessional statements of accused recorded under Section 67 of the Act, he relied on the following

decisions :-

(a) In **Husen Bhenu Malad and Others V/s. State of Gujarat and Others, 2003(2) G.L.H. 705**, the Division Bench of this Court, wherein one of us, A.M. Kapadia, J. is a party, has held that it cannot be laid down as an absolute rule of law that the statement of an accused recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. To put it differently, there is neither rule of law nor of prudence that the statement cannot be acted upon without corroboration. If the Court is satisfied that the statement is true and voluntary in nature, it can base conviction on it without corroboration. The Court has to scrutinise the statement carefully and must ensure that the statement is not result of coercion, duress or undue influence.

(b) In **M. Prabhulal V/s. Assistant Director,**

Directorate of Revenue Intelligence, (2003) 8 SCC 449, the Hon'ble Supreme Court has held that the accused – appellants in that case did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the Trial Judge under Section 313 of Criminal Procedure Code that a vague statement about torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of conviction.

(c) In **Mukesh Natvarlal Modi V/s. H.S. Barot and another, 1998 - XXXIX (1) G.L.R. 639**, the Division Bench of this Court has held that statements of accused and his family members were recorded by Customs Officers and since Customs Officers not being Police Officers, these statements are admissible in evidence.

(d) In **Usmanbhai Chandbhai Mansuri V/s. State of Gujarat and another, 2003 (3) XLIV (3) G.L.R. 1082**, the Division Bench of this Court has held that it is settled position that safeguards in respect of recording confessional statement as contained in Section 164 of the Criminal Procedure Code are not required to be followed by the empowered Officer, while recording statement under Section 67 of the NDPS Act until requirement is to ascertain whether such statement is voluntary or not.

(e) In **Surendra Kathadbhai Jebalia V/s. State of Gujarat, 2003 (3) XLIV (3) 2096**, the Division Bench of this Court has held that conviction can be found on retracted confessional statement of accused. If the statement was voluntary and it was true, then even if it is retracted, the inculpatory statement could be relied upon to base conviction. At the most, it would be required to examine the evidence and look for circumstances or evidence to

reassure itself about the confessions made. The Court has found as a matter of fact that there is ample evidence regarding involvement of accused Nos. 3 to 5 & 6 in a narcotic crime, as they are found to be transporting Mandrax tablets in large quantity. There is oral evidence of Officers of D.R.I. and panch witnesses which connect them with the contraband. Their statements under Section 67 are only additional factors to lend support to the prosecution case. The Court further held that there is no dispute that a series of statements were recorded from many of the accused persons. But that by itself is not a ground to infer that the statements were given under duress. It cannot be overlooked that persons involved in such organized criminal activity would not readily volunteer to give inculpatory statement. In such situation, a tactful and specialised method of interrogation may be required to be resorted to which may help in bringing out the truth and, therefore, repetitive statements by themselves cannot vitiate the statements with duress. This by itself will not affect the prosecution case.

(f) In **Surjeet Singh Chhabra V/s. Union of India and others, (1997) 1 SCC 508**, the Hon'ble Supreme Court has held that in view of the confession made by the importer – petitioner that he had purchased the gold and brought the same, he is bound by the same and the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So, there is no need to call panch witnesses for examination and cross-examination by the petitioner.

27. On the basis of the aforesaid submissions and the statutory provisions as well as the case law, Mr. Oza has submitted that the learned Additional Sessions Judge, Rajkot has perused the entire record, documents and material placed before him for his consideration and he has considered all the relevant

and material documents and the case law and come to the conclusion that the non-inclusion of the other Directors of the company in the complaint does not have any bearing to the facts of the present case. This Court being the Appellate Court cannot consider the plea that non examination or non-inclusion of a particular person in the present case will also give a benefit of doubt to the other persons who were tried and convicted by the Sessions Court. On this ground the case of prosecution cannot be declared as defective or erroneous. The learned Additional Sessions Judge, Rajkot after scrupulously scrutinizing the material and the documents available with him has not thought it fit to appreciate the argument canvassed by the accused at the time of hearing of the trial and, thereafter, he has not found it necessary and proper to induct and implead other Directors as accused. He has, therefore, submitted that the order and judgment passed by the learned Additional Sessions Judge, Rajkot convicting and sentencing all the three accused cannot be interfered with.

28.Mr. K.T. Dave, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat has virtually adopted all the arguments and submissions made by Mr. Oza appearing for the Directorate of Revenue Intelligence.

29.We have extensively heard the learned advocates appearing for the respective parties and have given our anxious thought to their submissions. We have minutely and carefully gone through the pleadings of the parties as reflected in all these appeals. Oral as well as documentary evidence produced on record and authorities cited before the Court have also received our due attention. We have undertaken the complete and comprehensive exercise of appreciating vital features of the case and the entire evidence on record with reference to broad probabilities of the case. We have also gone through the entire testimonial connection. We have applied our mind to the impugned judgment and order

passed by the learned Additional Sessions Judge, Rajkot convicting the accused and sentencing them for R.I of 10 years and fine of Rs.1 lac each and in default thereof to undergo further R.I of one year.

30. In order to find out whether the prosecution has established the charge against all the three accused beyond the reasonable doubt and whether the learned Additional Sessions Judge, Rajkot has recorded just and correct conclusion holding them guilty and acquitting the accused No. 4 the Company, we may first advert to the oral testimonies of the prosecution witnesses. The prosecution has produced their witnesses to depose before the learned Additional Sessions Judge, Rajkot. All the witnesses either they are panchas who drew the panchnamas or Investigating Officers and FSL Expert.

A) P.W. M.M. Gunsai is Senior Intelligence Officer and he has filed complaint on 14.03.1999 in the Court of learned Additional Sessions Judge, Rajkot.

B) The accused No. 1, Nitin Khimji Bhanushali in his statement recorded under Section 67 of the Act, inter alia deposed that he was earlier arrested as found involved in the smuggling of silver and was detained under COFEPOSA; that after release from there he was again arrested by Customs in case of illegal exports; that he was again arrested by Customs in case of illegal exports; that he was again arrested by the Mumbai Police in case of export of Mandrax tablets and that he escaped from Mumbai Police Custody during trial, that he was staying away from his home in Mumbai ever since absconding; that he was staying in Rajkot in assumed name of Rambhai; that in Rajkot he got introduced to Nalin Raichura (accused No. 2) and became friendly with him; that through one of his relatives he got an order for manufacture and supply of mandrax tablets; that through Nalin Raichura he arranged space to start manufacture; that he had paid Rs. 2 Lac to Nalin Raichura and it was decided that he would get 50%

share of the profit; that he had set up the manufacturing facility in M/s. Omni Engg. Pvt. Ltd., G-1116, Metoda, GIDC, Tal. Lodhika, Rajkot; that he had manufactured the Mandrax Powder and tablets in the said factory; that from the tablets prepared by him by hand process he had handed over 5 Nos. of sample tablets to another person on 14.12.1998 and he had been paid Rs.50,000/- in cash at that time by the other person; that they had prepared sample of 14 Kg. of Mandrax on the first floor of M/s. Omni on 12.11.1998; that this Mandrax powder was made by reacting Acetic Anhydride, Anthranilic Acid, Ortho Tludine and PC13 in the Glass Lab which was at that time installed on the first floor of M/s. Omni and it was subsequently shifted to the room in the back of the factory; that on 09.12.1998, he had prepared about 7 Kg. of Mandrax powder which was lying in the two trays in the machine room; that he had been negotiating with the supplier for changing the Lab from 50 Ltrs. to 200 Ltrs.; that he had been shown certain transport documents like L.R.s, Consignment Notes, Invoices etc. and he confirmed that the said

documents had been taken over by the officers of DRI, Ahmedabad vide Panchnama dated 15.12.1998 from Room No.205 of Hotel Savera Palace; that the said documents were used for transporting chemicals like Acetic Anhydride, Anthranilic Acid, Phosphorus Trichloride, Toluidine etc. for use in the manufacture of Mandrax Powder and then Mandrax Powder; that the above chemicals were used for manufacturing the 11.5 Kg. Of mandrax powder found in the premises at the back side of M/s. Omni; that the said chemicals had been brought at the said premises by him for manufacture of mandrax tablets; that he had brought Dayaram Mangaldas Nakhwa (Accused No.3) a close friend of his, to Rajkot to assist him in the manufacture of Mandrax Tablets after he had started the factory; that the accused No. 3 used to go to the factory with him and assist him in mixing, washing and drying of the mandrax powder, that he had been with him in the Hotel Room No. 205 upto morning of 15.12.1998; that some mandrax tablets and mandrax powder and lumps and pieces of mandrax were found in his hotel room during the

search of the room under panchnama on 15.12.1998; that a few Mandrax tablets and cash connected to deal of the same were found on his person during his personal search in presence of gazetted Officer on 15.12.1998; that he had kept the dies / punches and die base under the cupboard in the office of M/s. Omni and he had used the same for manufacturing the mandrax tablets.

C) The DRI Officers have also recorded the statements of the accused No. 2, i.e. Nalinkumar Raichura on 16.12.1998 and 17.12.1998 under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that he got introduced to Nitinbhai @ Rambhai and came to know that this Nitinbhai @ Rambhai was in great difficulty; that on 10th October 1998 Nitinbhai @ Rambhai telephonically informed him that he was staying in Hotel Savera and asked him to come to that Hotel; that when he went to Hotel Savera, he was told by Nitin @ Rambhai that business in Mandrax Tablets which is a Psychotropic

Substance is quite lucrative and if he does this, he can earn handsome money; that he agreed to do this business though he was knowing that it was illegal; that Nitin Bhanushali on telephone told him that Mandrax tablets in ready made form were not available and some other arrangements would have to be made; that on or around 25.10.1998 Nitin Bhanushali rang up and informed him that since the arrangements for ready made tablets have not been materialized, its manufacture will have to be carried out; that for this electricity, water and space were required; that he offered him the space in the rear side of their factory premises of M/s. Omni and gave him his consent for manufacturing of the Mandrax tablets and also offered facility of electricity and water; that after making arrangements for machinery and raw materials Nitin Bhanushali again rang him up and informed him about the same and with his consent set up the Mandrax manufacturing facility in their factory; that on 22.11.1998 Nitin along with some persons manufactured Methaqualone powder 14/15 Kgs. on first floor of

their factory; that again on 08.12.1998 they along with Dayaram M. Nakhwa manufactured 7 Kgs. of Methaqualone powder in the rear side rooms; that he received Rs. 2 Lacs from Nitin; that he was aware that Nitin was a declared absconder.

D)The DRI Officers have also recorded the statements of the accused No. 3, i.e. Dayaram Mangaldas Nakhwa on 16.12.1998 and 17.12.1998 under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that he knew Nitin Bhanushali for the last about 10 years; that he met Nitin in the Court while his trial was going on; that after some time he came to know that Nitin Bhanushali had escaped from Court, that after some time he went to enquire about Nitin Bhanushali at his flat but he was not available; that he left his P.P. telephone No. 8699771 with his wife and told her to ask Nitin to contact him at this number; that around 1st December 1998, Nitin telephoned him and asked him to come to Rajkot; that Nitin gave him the telephone

no. of the Hotel where he was staying; that he came to Rajkot and reached the Hotel Savera where Nitin Bhanushali was staying; that he asked for some work from Nitin; that Nitin offered him to stay with him; that he stayed with him for four days; that during this period one person came to meet Nitin whom he introduced as Nalin; that Nitin took him to the factory premises of M/s. Omni owned by Nalin where Diesel Engine Parts were manufactured; that in three rooms of the factory in the rear side, some machinery was installed; that on his asking Nitin informed him that this machine was for manufacture of '*nashili goli*' and on its consumption one feels drowsy and sleepy; that Nitin informed him that about 10 - 12 Kg. of raw material which was of red colour was to be washed; that he would have to assist him in this activity and stay with him; that in his presence about 50 - 60 tablets were manufactured; that during that period Nalinbhai was also present; that these sample tablets were taken by Nitin to the Hotel; that he stayed with Nitin at the factory for two days and washed the raw materials

used in the manufacture of tablets; that on 11.12.1998 he alongwith Nitin returned to the Hotel; that after Nitin took him to Jamnagar for carrying the chrome work of die punches and returned back and stayed in the Hotel; that during their stay one person telephoned Nitin who gave his name as Rajubhai; that on asking about this Rajubhai, Nitin told him that he was the same Navinbhai Shah from whom he had received money for the manufacture of Mandrax tablets and that though he knew that manufacture of psychotropic tablets is illegal, he still helped Nitinbhai in the manufacture of the same since he badly needed money.

E) The DRI Officers have also recorded the statement of Shri Kishor Bhagwandas Acharya, Accountant of M/s. Omni on 16.12.1998 under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that Nitin Khimji Bhanushali was visiting the factory of M/s. Omni for the past one year and since the past 20 - 22 days he was visiting the said

factory continuously; that as per the directions of Nalin Raichura, he took Nitin to factory from Hotel Savera and took his back to hotel Savera; that Nalin Raichura and Nitin used to sit on the first floor of the factory; that new construction began only before about 20 days from the date of this statement and it was told by Nalin that it was for residence of laborers; that Nalin was a Director of the Company and Nalin and Nitin were doing something in the rear side of the factory where new rooms were constructed and that he was told not to go in that rear side.

F) The DRI Officers have also recorded the statement of Shri Shaileshkumar Natwarsinh Parmar, Manager of Hotel Savera Palace, Limda Chowk, Rajkot under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that he was present during the Panchnama proceedings at Hotel Room No. 205 on 15.12.1998 and he identified accused No. 1 from xerox copy of the photograph as Shri R. K. Gajera @

Rambhai who had been staying in their Hotel for some time. He has also stated that the said R.K. Gajara had paid Rs.25,000/- towards payment for his stay from 10.11.1998 to 15.12.1998 on 14.12.1998 at about 8.30 p.m.; that on 15.12.1998 he had collected receipts and the balance amount of Rs.641.00; that Nalin Raichura used to come to meet Shri R. K. Gajera frequently; that another person whose name he did not know occasionally used to come to meet R. K. Gajara from before 10 - 12 days from 15.12.1998. He also identified both the accused Nos. 2 & 3 as Nalin Raichura and the other person who came to visit R. K. Gajera.

G) The DRI Officers have also recorded the statement of Shri Bakul Parekh, one of the Directors of M/s. Omni Engineering Industries Private Limited on 21.12.1998, 04.01.1999, 05.01.1999, 29.01.1999 and 19.02.1999 under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that other directors are Shri Divesh C. Sejpal, Shri Deepak

Shah and Shri Nalin Prabhudas Raichura; that the said Company was constituted in the year 1995 for manufacturing Sheet Metal Components/oil engine parts; that the registered address of the Omni Engineering is at 2/2, Sindhi Colony, Sion West, Mumbai-400 022; that a loan of Rs.49 Lacs from the Gujarat State Financial Corporation; that he visits Rajkot in connection with the Omni Engineering work and meets Shri Nalin Raichura; that the share capital of the Company is Rs. 20 Lacs out of this his contribution was Rs.10.52 Lacs, Rs. 8.46 Lacs by Shri D. C. Sejpai, Rs.10,100/- by Shri Nalin Raichura, Rs.1,000/- by Deepak Shah; that he had last visited the factory i.e. M/s. Omni Engineering in the first week of October, 1998; that he last visited Rajkot on 7/8 of October 1998; that as Director and promoter of the Company he gives general guidance on the running of the company; that on certain occasions he attends to the company work personally; that there were four promoters and two Directors in the beginning as per the Articles of Association of the Company; that later one more Director was taken on

Board; that there was no managing Director post in the Company; that Shri Nalin Raichura was being paid Rs.15,000/- per month as remuneration by the Company; that he was also performing some extra duties of the Company such as Bank transactions of the Company and that he had not done anything to give effect to the Board resolution dated 30.09.1995 under which he was authorized to give effect to the Board resolution appointing Shri Nalin Raichura except considering him as the Director from that date and the said Resolution was left unsigned in the Company Board Meetings Minute Book by the Chairman of the meeting.

H)The DRI Officers have also recorded the statement of Shri Divesh C. Sejpai on 21.12.1998, 04.01.1999, 29.01.1999 and 19.02.1999 under the provisions of Section 67 of the NDPS Act. He has, inter alia, deposed that he was Director of M/s. Omni Engineering Industries Private Limited; that the Omni Engineering project was conceived to

manufacture sheet metal parts on the advise of Shri Deepak Shah; that he had financed the said Company to the extent of Rs. 8.46 Lacs; that the understanding was that he would get 23% of the profits as his share, Shri Bakul Parekh would also get 23% as his share, Deepak shah would get 37% and Shri Nalin Raichura would get 17%; that the land for setting up the factory was purchased from the GIDC; that the GSFC had given a loan of Rs. 51 Lacs for setting up the factory; that the documentation work was looked after by Shri Kishore, Accountant of the Company and Shri Nalin Raichura, Director of the Company; that the entire production related work was looked after by Shri Nalin Raichura; that he used to visit the factory premises and the last visit was on 26.11.1998; that as they were in need of some local person they had taken Shri Nalin Raichura in their Company; that being a chartered accountant by profession he was looking after income tax and registrar of Companies matters of the Company from the beginning; that the Company was maintaining the Minutes Book for its

Meetings; that there was no change to the Memorandum of Understanding and the Articles of Association of the Company in view of the Boards Resolution 30.09.1995; that the said Resolution was remained to be signed by him as he headed that Board Meeting; that Shri Nalin Raichura being a local person attends to the day to day work of the Company such as Excise Dept., Banks, Sales Tax and GIDC matters; that Shri Bakul Parekh looks after the over all affairs of the Company which require major decisions such as to apply for Bank facilities, any issue with Kirloskers; that though they had not informed any agency about the appointment of Shri Nalin Raichura as Director but the fact was that he was signing as Director of the Company in all the correspondence with the Agencies and the vouchers for the construction of the room meant for one of the workers namely Shri Shivaram were not available from the vouchers file.

I) During the post seizure investigations, the DRI

officers have recorded the statements of Shri Deepak Jayantilal Solani, Branch In-charge of M/s. Vijay Transport, Jamnagar, Shri Vipul Dhirajlal Shethna, Branch In-charge of M/s. Vijay Transport, Rajkot, Shri Noormamad Hasanbhai Sodha, Driver of Tempo No. GJ-3-V-5787, Shri Digvijay Mohabatsinh Jadia godown incharge of M/s. Lalji Mulji Transport, Shri Ramniklal Shivilal Pujara, Manager of M/s. Patel Transport, Rajkot, Shri Manalikattil Subramanian Shivaraman, Machine Operator in M/s. Omni, Shri Maganbhai Arjunbhai Mungra, Proprietor of M/s. Madhura Electro Plates, Jamnagar, Shri Sunilkumar Garg, Partner of M/s. Garg Lab Glass Industries, GIDC, Vapi.

31. From the above referred confessional statements and incriminating materials found and seized, it is proved beyond any reasonable doubt that not only their confessional statements but other independent and corroborated evidence established their link with the commission of crime. All of them were

found present at the scene of offence. Left over raw materials and papers were found from the factory premises. Thus, offence against the accused Nos.1, 2 and 3 was proved beyond any reasonable doubt.

32.From the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that despite some discrepancies, contradictions, omissions and infirmities are found in the oral as well as documentary evidence, the prosecution has proved its case beyond any reasonable doubt against the accused Nos. 1,2 & 3. Though several contentions were raised before the Sessions Court as well as before this Court and we found substance therein. We, however, confine ourselves to deal with the strong protest lodged against the non-compliance of the statutory provisions and intrinsic worth and reliability of the statements recorded under Section-67 of the Act as well as failure on the part of the prosecution to

implicate other Directors of the Company. We do not disturb the finding recorded and conclusion drawn by the learned Additional Sessions Judge, Rajkot so far as the conviction and sentence imposed on accused Nos.1, 2 and 3 is concerned as they were very much present at the place of commission of the offence and also the contraband articles, namely, mandrax tablets were found from the premises of the Company and it was duly supported and corroborated by the confessional statements recorded under Section-67 of the Act showing their involvement in the manufacturing of such mandrax tablets. Despite the fact that the accused No. 4 i.e. the Company is also involved more or less on the same line and Company's premises was used for manufacturing mandrax tablets, the learned Additional Sessions Judge, Rajkot has acquitted the Company. Hence, though we find ourselves in conformity with the findings and ultimate conclusion and resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Rajkot qua accused Nos.1, 2 and 3 and though we

are in complete agreement with the said finding, ultimate conclusion and resultant order of conviction and sentence as according to us no other conclusion is possible except the one reached by the learned Additional Sessions Judge, Rajkot on the facts and circumstances of the case and though we find no infirmity in the said reasoning of the learned Additional Sessions Judge, Rajkot and though we are of the view that the evidence has been carefully noticed and fully appreciated in the reasoned judgment and though we do not think it right to give any further reason than what has been given by the learned Additional Sessions Judge, Rajkot in the impugned judgment and order and though we are not inclined to interfere in the order and judgment of the learned Additional Sessions Judge, Rajkot qua accused Nos.1, 2 and 3, the acquittal order passed against the accused No. 4 Company cannot be sustained for the following reasons:-

- 1) Section 38 of the NDPS Act deals with offences by Companies. It says that where an offence under

Chapter IV has been committed by a company, every person, who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Accused No. 2, namely, Nalinkumar Raichura was considered to be the Director of the accused No. 4 Company. He was found at the time of raid in the premises of the Company. It was established on record that the Company's premises was used for the purpose of manufacturing of Mandrax tablets. Simply because there is some dispute with regard to the directorship of Mr. Raichura, it cannot be said that the Company is not held to be guilty under Section 38 of the NDPS Act. It is rather surprising and to some extent it is very unfortunate that the prosecution has not impleaded other Directors of the Company. Provisions contained in Section 38 are very clear and the persons who are in charge of and are responsible to the Company for the conduct of

the business of the Company are deemed to be guilty of the offence and in that view of the matter, other Directors are also liable to be proceeded against and punished accordingly. It is altogether a different thing that after their impleadment in the proceedings, if they are in a position to prove before the competent Court that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such offence, no punishment may be inflicted on them. Neither the prosecution nor the learned Sessions Judge has correctly considered this provision.

- 2) So far as Company's liability is concerned, Section 22 of the NDPS Act makes it clear that whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable, where the contravention involves

commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. A discretion is also given to the Court and the Court may impose a fine exceeding Rs. 2 Lacs after recording of the reasons in the judgment. It is an admitted position that the Company is a person. It was found to be in possession and use of Mandrax tablets, the psychotropic substances. The Company thereby contravened the provisions contained in the NDPS Act and such contravention involved commercial quantity. The Company is, therefore, certainly held to be liable along with other accused. Since the Company being a corporate personality, it cannot be sentenced for any imprisonment. However, fine can certainly be imposed on the Company for such contravention. Looking to the nature of contraband article and quantity involved therein, the Court could have imposed a fine exceeding Rs.2 Lacs after holding the Company

guilty for commission of offence under Section 22 read with Section 38 of the NDPS Act. It is again very unfortunate that in the appeal filed by the Directorate of Revenue Intelligence, notice issued by this Court was duly served on the respondent Company and despite service of notice, the Company has, however, chosen not to file any appearance. The Court, therefore, after perusing the entire record and proceedings as well as after considering the submissions made by Mr. Oza on behalf of the Directorate of Revenue Intelligence, deems it fit to hold the Company guilty and imposes fine of Rs. 2 Lacs on the Company for commission of offence punishable under Section 22 read with Section 38 of the NDPS Act.

- 3) Immediately after the raid, the Company's premises was sealed. An application being Criminal Revision Application No. 432 of 1999 was filed before this Court by Mr. Divyesh Sejpai and Mr. Bakul Parekh, Directors of the Company challenging the order

dated 16.07.1999 passed by the learned Sessions Judge, Rajkot in Criminal Misc. Application No.58 of 1999 whereby the learned Sessions Judge has rejected the said application and prayer made therein for removal of the seal. While allowing this application, this Court vide its order dated 11.01.2000 imposed certain conditions which inter alia includes that the petitioner shall separate three rooms where the alleged activity of manufacturing Methaqualone powder was carried as per the allegations made in the complaint and to keep it as it is where it is as DRI has already applied the seals on those three rooms and petitioners were directed to protect the same as it is where it is and even DRI is directed to prepare the inquest panchnama to that effect also and the petitioners were directed not to make any change or alteration in the situation in any way till the final disposal of the case. The Court has also imposed condition that the petitioners shall not sell or transfer the property i.e. factory and other machinery which are lying in the factory in question

till the final disposal of the case. The Court further imposed condition that the petitioners shall be bound by the final orders which may be passed by the trial Court pertaining to the factory premises and plant and machinery subject to the rights of the petitioners' to file appropriate legal proceedings against such order. Only on the aforesaid conditions, seal was ordered to be removed. Since this Court is now taking up the view that the Company is also held to be liable for commission of the offence, the amount of fine which is imposed shall be recovered from the assets, if any of the Company and if it could not be recovered from the assets of the Company in that case, in view of the aforesaid order dated 11.01.2000 passed by this Court, the Directorate of Revenue Intelligence can recover the amount of fine from the petitioners in that case, namely, Mr. Divyesh Sejpal and Mr. Bakul Parekh as they have agreed to the conditions imposed by this Court while allowing them to remove the seal and they were bound by the final order which may be passed by the Trial Court which is now

merged in the order of this Court. In absence of any representation from the Company and in absence of proper information with the learned Counsel Mr. Oza with regard to the present position of the Company, it is not possible for this Court to express any opinion as to whether other conditions imposed by the Court in its earlier order dated 11.01.2000 were violated by the petitioners during the pendency of the criminal case before the trial Court or even during the pendency of the Appeal before this Court. Be that as it may, the order of imposing the fine of Rs.2 Lacs on the Company shall be complied with by the Company and its two Directors, namely, Mr. Divyesh Sejpal and Mr. Bakul Parekh who have earlier approached this Court for removal of the seal and who have agreed to the conditions imposed by this Court.

- 4) We are constrained to observe that the accused No.2 Mr. Raichura has moved an application Exh. 92 on 30.01.2003 under Section 59 of the NDPS Act.

Section 59 deals with failure of Officer in duty or his connivance at the contravention of the provisions of this Act. Serious allegations were made in the said application against the Investigating Agency and it was alleged therein that though there is prima facie case against Mr. Divyesh Sejpai, Chairman and Mr. Bakul Parekh, the Director of the Company, they have not taken any action against them and they have tried to save them. Various informations were given in the said application. Though the said application was kept for hearing, it appears from the record that the same has not been decided and straightway the charge was framed at Exh. 95 on 26.03.2003. Not making proper inquiry in this regard raises very serious doubt on the conduct of Officers of the Investigating Agency as well as not deciding this application and straightway framing the charge is also not in accordance with the sound judicial principles. Since the offence is committed in the year 1998 and the entire trial was over and the accused have virtually undergone or on the verge of undergoing the sentence imposed on them, this

Court is not passing any further order for making any fresh inquiry in the matter. The Investigating Agency is, however, supposed to act neutrally, impartially and it is under an obligation to bring the real culprits on the record of the case. Simply because they are highly influential persons or they are in a position to make others as their scapegoats, inquiry against them should not be abandoned.

5) We are also not convinced with the submission of Mr. Oza that in view of the said application preferred by the accused No. 2 under Section 59 of the Act, departmental inquiry was made and after full-fledged inquiry, it was found that these persons were not involved. We leave this matter here as it is not the issue before us. We are, however, not satisfied with the way in which the inquiry was conducted and case was put up by the Investigating Agency before the trial Court.

6) We are also not satisfied with the approach of the

learned Additional Sessions Judge in not allowing the prosecution to produce certain documents and to give them exhibits. A bare perusal of these documents makes it unequivocally clear that Mr. Raichura was acting all throughout as a Director of the Company and he was actively associated and whatever was going on in the premises of the Company was well within the knowledge of all the Directors of the Company.

33. In the above view of the matter, we reverse the judgment and order of the learned Additional Sessions Judge, Rajkot so far as the acquittal of the accused No. 4 i.e. Company is concerned and allow Criminal Appeal No. 620 of 2006 filed by Directorate of Revenue Intelligence. We are mindful of the settled legal position as to how and under what circumstances the acquittal orders are to be reversed by the Appellate Court. However, looking to the facts of the present case and the seriousness of the offence, we are of the strong view that the

learned Additional Sessions Judge, Rajkot has committed a very serious error in law as well as on facts in acquitting the accused No. 4 Company and no view other than the conviction of the Company is possible in the present matter and accordingly, we convict the Company and imposes fine of Rs. 2 Lacs which shall be recovered in the manner as indicated in the earlier paragraph of this judgment.

34. Accordingly, Criminal Appeals No. 1774 of 2004, 1307 of 2006 and 2318 of 2006 filed by the original accused Nos. 1, 2 & 3 are dismissed and Criminal Appeal No. 620 of 2006 filed by the Directorate of Revenue Intelligence against accused No. 4 Company is hereby allowed.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya